PEH SENG LEH & ORS.

v.

ZAINAL ARIFFIN

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. 2727 OF 1978]
30 MAY 1983

DAMAGES: *Quantum - Defendant totally to blame.*

As a result of an accident, the pillion rider died and his parents brought a dependancy claim pursuant to s. 7, Civil Law Ordinance 1956. The third plaintiff was the rider of the motor cycle involved in the accident.

Held:

Quantum

[1] Dependancy Claim

(i) Pre-trial dependancy loss RM15,310.00

(ii) Post-trial dependancy loss RM20,830.95

(iii) Agreed funeral expenses RM 1,500.00

Interest at 4% per annum on items (ii) and (iii) from date of accident to date.

[2] Third plaintiff's Claim

(i) General damages - RM30,000
Interest at 6% from date of service of writ to date

(ii) Pre-trial loss of earnings - RM12,700

(iii) Agreed medical and other expenses - RM1,397.80
Interest on items (ii) and (iii) at 4% per annum from date of accident to date

(iv) Loss of future earnings - RM41,396

[Judgment for the 1st and 2nd plaintiff.]

Cases referred to:
San Seng Choy & Ors. v. Yuson Bien [1962] 28 MLJ 427
Govinda Raju & Anor. v. Laws [1966] 1 MLJ 188
Jamaliah bte Mohamad (infant) v. Ng Fook Seng [1982] 2 MLJ xlviii

Legislation referred to:
Civil Law Ordinance 1956, s. 7

For the plaintiffs - K. Pasupathy
For the defendant - K.G. Pillay

JUDGMENT

Siti Norma Yaakob J:

Except for certain items of special damages that were agreed namely funeral expenses at RM1,500, medical expenses at RM1,072.80, miscellaneous other expenses at RM385, liability, quantum and claims for loss of earnings were disputed in this running down action.

The pillion rider died as a result of this accident and hence his parents, the first and second plaintiffs, bring this dependancy claim pursuant to s. 7 of the Civil Law Ordinance 1956. The 3rd plaintiff was the rider of the motor cycle that was involved in the collision with the defendant's motor car.

At the end of the trial, I had indicated that the defendant is 100% to blame for this accident but all the same I had adjourned the matter until today to consider the monetary aspects of this case.

As with cases of this nature, both parties led evidence that was contradictory of each other. The 3rd plaintiff's version was that as he was proceeding along the 2¾ m.s. Jalan Pahang in the direction of Kuala Lumpur, the defendant's car in attempting to cross the road to proceed towards the opposite direction suddenly shot out of a petrol station that was situated to his left and in doing so collided into his motor cycle. The defendant on the other hand testified that he had exercised due care and attention when attempting to cross the road but all the same the collision happened but only after he had safely crossed the centre white line and on his right of way.

In the light of such evidence I rely greatly on the sketch plan and key, P4 and P4K, to determine whose evidence I can accept to establish liability. See the case of *San Seng Choy & Ors. v. Yuson Bien* [1962] 28 MLJ 427, when it was held that where -

> drivers and witnesses on each side tell conflicting stories, the photographs, plan and measurements of the scene, and the nature of the damage to each vehicle must provide the most reliable guide by which such evidence can be tested.

In the absence of evidence to the contrary the presence of glass fragments is normally indicative of the point of impact. On P4, all the glass fragments are found in one spot, Q, which is 4 feet away from the centre white line. One side of the road, C to D measures 19 feet and this would mean that the 3rd plaintiff was 15 feet away from the left edge of the road at the time of the collision. This corroborates his evidence when he testified that the accident happened after he had overtaken a stationary bus that forced him to proceed more towards the centre of the road then to his left. Then again the only blood stains are found at E which is also on the 3rd plaintiff's right of way.

Turning now to the defendant's evidence he maintained that the 3rd plaintiff was proceeding very fast as he was overtaking a few other cars in front of him. If that be so, then the motor cycle which the defendant described as a scrambler in his police report appearing at p. 2 of the agreed bundle of documents, AB1, must have caused a loud din as to make him aware of its presence on the road. But he were not aware of its presence neither did he see it approaching even though he testified that he waited about 10 minutes at the entrance of the petrol station before crossing the road and at that spot he could see clearly 100 feet away to his right. This accident happened on a Sunday morning when it is quite normal to expect that the traffic was not heavy on that stretch of the road. This was also borne by the defendant but yet he had to wait 10 minutes before he attempted to cross the road. In the course of giving evidence the defendant had appeared evasive and unsure and on the whole I could not accept his evidence. From P4, it is clear that the impact occurred at Q, the 3rd plaintiff's right of way and since the defendant was proceeding from a minor exit road he must give way to through traffic proceeding along a major road. See the case of *Govinda Raju & Anor. v. Laws* [1966] 1 MLJ 188. Under these circumstances there can be no question of contributory negligence and I therefore hold the defendant solely to blame for this accident.

I now go to the dependancy claim of the first and the second plaintiffs. Their deceased son was 18 at the time of the accident which happened on 2 April 1978. He was a painter and according to his employer, PW5, he was paid RM18 per working day and he worked for 25 or 26 days in a month. As a sub-contractor for painting himself, PW5 maintained no records of his employees but he kept a roster together with details of their wages on a blackboard which he hung at the site office. Once these employees have been paid, their names and other details would be wiped off and a new roster set up. In the absence of other evidence to suggest that the deceased's wages were in no way excessive, I accept PW5's evidence and hold that the deceased was paid RM18 per working day and based on 25 working days in a month, his monthly income would come up to RM18 x 25 = RM450.

To arrive at a proper calculation on this dependancy claim I have two periods to consider; the pre-trial dependancy loss which covers the period from the date of death to the date of judgment, in this case 5 years and 1 month and the post-trial dependancy loss calculated on the life expectancy of the dependants, for whose benefit this claim is brought. The deceased was the eldest of three children born to the first and the second plaintiffs. At the time of the deceased's death, the first plaintiff was living separately from the second plaintiff, his first wife. He was and still lives with a second wife with whom he has 4 other children. As a result he made irregular contributions ranging from RM50 to RM100 to the second plaintiff and relied greatly on the deceased to maintain the second plaintiff and her two other children. Under these circumstances it is not therefore unreasonable that the deceased, being the eldest son, must have maintained his mother and the two younger children of the family by making regular monthly contributions to her.

Now how much would this monthly contributions be? According to the second plaintiff, she spent RM400 on food and other household expenses, RM60 on house rent, RM15 for water and electricity, making a total of RM475 per month. She was then earning RM100 per month as a washer woman and together with her son's monthly contributions of RM300 she just barely made ends meet. As a husband and father, the first plaintiff cannot shirk his responsibility by pleading that he depended on the deceased for the maintenance of his first wife and two children. Bearing in mind his share of financial support and the second plaintiff's income, I consider a monthly contribution of RM250 from the deceased prior to his death as being fair and reasonable. For the pre-trial loss then, I would calculate the amount to be RM250 x 61 = RM15,310.

For the post-trial loss, I have to consider firstly the life expectancy of the first and second plaintiffs, the beneficiaries of the deceased's estate. At the time of the deceased's death, the first plaintiff was 38 years old and the second plaintiff 37. Giving them another 18 years of purchase with a reduction of 1/3 for contingencies and the 5 years pre-trial period, they would enjoy another 7 years purchase after trial. There was also evidence that with each coming year there would have been an increase in the deceased's income, in which case, it would be natural to assume that he would contribute a little bit more to the RM250 that I awarded above. There was evidence from PW5 that had the deceased lived and continued working as a painter, he could easily earn RM40 to RM50 per day. Just as I expect the deceased to increase his monthly contribution to his mother with the passing of time, I am also not forgetting the fact that at the same time, he may need more to spend on himself and he may have found a wife and settle down with his own family. Then again the two younger members of the family would have grown to be adults, and following the pattern of their elder brother would be working and contributing to the family upkeep. The deceased started working at

an early age of 15 and there is always the possibility that the sister or brother would have done likewise. Bearing all these factors in mind, I consider the sum of RM300 per month as being a reasonable sum to expect the deceased to contribute monthly to his mother for the next 7 years, and according to the annuity table this works out to be RM20,830.95.

Next I turn to the damages to be awarded for Pain and suffering caused to the third plaintiff.

He suffered:

1. multiple lacerations on the forearm of the right elbow, on the palm, over the knee, right foot measuring 5" and 2½", first and second toe of the base of right foot measuring 3" and right heel measuring 2½". The lacerations have left scars on the right elbow and the whole of the right upper limb is weak.
2. comminuted fracture of the first metatarsal and cuboid bones of the right foot which have united satisfactorily.
3. right brachial nerve palsy causing the right wrist to drop. An operation was done to his right hand on 8 August 1979 and this proved to be partially successful and he was able to regain partial extention of the thumb and fingers but not the wrist.

For the multiple lacerations and the fractures of the two bones on the right foot, I consider RM10,000 as sufficiently reasonable for pain and suffering.

For the more serious hand injury, I was referred to the Singapore case of *Jamaliah bte Mohamad (infant) v. Ng Fook Seng* [1982] 2 MLJ xlviii where the infant plaintiff was awarded RM40,000 for a very severe crush injury to her right hand which has left it badly scarred and deformed, as only the thumb, index and middle fingers were left. Her right hand was essentially functionless other than retention of sensation. In the case before me, the third plaintiff's right hand looks normal enough, the only disability being that apart from the limited extension of his thumb and fingers, his right hand is very weak. Although he cannot carry heavy articles, he can still use it to carry out light sedentary work. Under the circumstances, I consider a sum of RM20,000 fair and reasonable for this injury.

At the time of the accident, the third plaintiff worked as a painter, earning RM18 per working day and for 25 working days in a month, he earned RM450. According to his employer, PW5, he only came back to work after the accident in early 1979 and pinpointing this to January of 1979, this would mean that he was incapacitated for 8 months after the accident. For this 8 months he would have lost 450 x 8 = RM3,600. After he returned to work in 1979, PW5 paid him only RM18 per working day. If his hand was not so affected he would have paid RM25 per working day, resulting in him losing RM7 per working day. From 1979 until this judgment which covers the period of 4 years and 4 months (52 months), I calculate his earning loss on the following table:

7 x 25 x 52 = RM9,100

The third plaintiff is now 24 and I give him another 36 years of working life. Reducing 1/3 of that life expectancy for contingencies, I would give him another 24 years of working life. There was evidence to show that a painter today can easily earn RM40 per day but because of the hand injury he could only work as an odd job labourer for which he was only paid RM200 per month. He has lived with his injury for the past 5 years and by now he should have realised that his livelihood as a painter could no longer be depended upon and as such he should mitigate his loss by looking for an employment whereby his right hand will

not be an impediment to his earning capacity. Just on one hand he complained that the injury to his hand had caused him his livelihood as a painter he may well be successful in some other trade or calling which may bring him more earnings that he had ever dreamed of getting. With this possibility I consider his further loss of earnings at RM250 per month and for the next 24 years his loss will amount to RM41,396, rounding the figure to the nearest dollar.

There will then be judgment to the first and second plaintiffs for the sum of RM15,310 being the pre-trial dependancy loss, RM20,830.95 post-trial dependancy loss, RM1,500 agreed funeral expenses, interest at the rate of 4% per annum on both these two sums from date of accident to date, judgment to the third plaintiff for RM30,000 being general damages, interest at the rate of 6% per annum from date of service of writ to date, RM12,700 per-trial loss of earnings, (RM3,600 + RM9,100), agreed medical expenses at RM1,012.80, miscellaneous other expenses agreed at RM385, interest at 4% per annum, on the total sum of (RM12,700 + RM1,012.80 + RM385) from date of accident to date hereof, loss of future earnings at RM41,396 and costs.

Also found at [1983] 2 CLJ 37